

State of Wisconsin \ Government Accountability Board

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MEMORANDUM

DATE: October 15, 2012

TO: Republican Party of Wisconsin
Kristina Sesek, Legal Counsel

FROM: Nathaniel E. Robinson
Elections Division Administrator
Government Accountability Board

PREPARED BY: David Buerger, Elections Specialist

SUBJECT: Response to Election Issues Memo of September 17, 2012

On September 17, 2012, the Republican Party of Wisconsin (RPW) submitted a memorandum outlining a variety of issues and questions related to the administration of elections and requested a written response to its inquiry. Government Accountability Board (G.A.B.) staff has examined each concern and provide our analysis and guidance regarding the relevant election laws below.

I. Proof of Residence

Proof of residence is required to register to vote in three situations:

- All electors, except military and overseas electors, who register by mail and have not previously voted in an election in this state. Wis. Stat. § 6.34(2).
- All electors, except military or overseas electors, who register in the time period beginning 19 days before Election Day and ending the Friday before the election. Wis. Stat. § 6.29(2).
- All electors, except military or overseas electors, who register on Election Day. Wis. Stat § 6.55(2)(b).

In the September 17th memo, RPW asserted a variety of examples of proof of residence allegedly submitted by electors and requested that G.A.B. address the validity of each specific item.

A. Prescription Bottle (Wilding Affidavit)

A prescription bottle is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). While the list of acceptable forms of proof of residence from Wis. Stat. § 6.34(3)(a) does provide some general categories such as “a document issued by a unit of government,” there is no allegation here that the prescription bottle contained any information that would suggest it qualified under such a provision. As such, G.A.B. staff concurs that a prescription bottle as described in the Wilding Affidavit does not constitute valid proof of residence.

It should be noted that the Wilding Affidavit only alleges that a prescription bottle was presented as proof of residence, not that the election official accepted this as valid proof of residence.

B. Personal Check (Costello, Darrow, and Wilfer Affidavits)

A personal check is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). The only checks described are a “paycheck” or “check... issued by a unit of government.” Wis. Stat. § 6.34(3)(a)10-11. As these checks are not described as such, we concur that personal checks are not valid proof of residence. A personal check does not fall under the category of a statement from a financial institution. Wis. Stats. § 6.34 (3)(b)9.

C. Rent Receipt (D’Abbraccio Affidavit)

A receipt for payment of rent is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). While the list of acceptable forms of proof of residence from Wis. Stat. § 6.34(3)(a) does provide some general categories such as “a document issued by a unit of government,” there is no allegation here that the rent receipt contained any information that would suggest it qualified under such a provision. As such, we concur that a rent receipt as described in the D’Abbraccio Affidavit would not constitute valid proof of residence.

D. Credit Card Statement (Johnson Affidavit)

A credit card statement is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). According to the Johnson Affidavit the credit card statement was accepted by the election official under the provision allowing a “bank statement” under Wis. Stat. § 6.34(3)(a)9. G.A.B. staff has considered this argument previously and rejected it.

Absent a statutory definition, G.A.B. staff applies a word’s common definition. A bank statement is “a report issued periodically (usu. monthly) by a bank to a customer, providing certain information on the customer’s account, including the checks drawn and cleared, deposits made, charges debited, and the account balance.” Black’s Law Dictionary 1417 (7th ed. 1999). A bank is “A financial establishment for the deposit, loan, exchange, or issue of money and for the transmission of funds; esp., a member of the Federal Reserve System.” Black’s Law Dictionary 139 (7th ed. 1999). This is distinguishable from a “credit card”, which is “an identification card used to obtain items on credit, usu. on a revolving basis.” Black’s Law Dictionary 375 (7th ed. 1999).

G.A.B. staff has consistently made this distinction in election official training materials and voter education materials. While credit cards may be issued by banks and accounts consolidated onto a single statement, the defining attributes of a bank statement revolve around the deposit of money, which then has checks drawn or debits made against it. As such, we concur that a credit card statement as described in the Johnson Affidavit would not constitute valid proof of residence.

While Wis. Stat. § 6.34(3)(a)9. permits the use of a bank statement as proof of residence, the G.A.B. has consistently advised local election officials that statements from other financial institutions as defined in Wis. Stats. § 705.01 (3), may also be used as proof of residence. This includes a bank, building and loan association, credit union, trust company, savings bank, and savings and loan association.

E. United States Postal Service – Forwarding Address Sticker (Till, Wagner, and Newell Affidavits)

The Till, Wagner, and Newell affidavits all allege separate instances of election inspectors accepting envelopes with yellow forwarding mail stickers on them as proof of residence. Presumably, the election inspectors were accepting these stickers under Wis. Stat. § 6.34(3)(a)11., “a check or other document issued by a unit of government.”

Undeniably, the United States Postal Service (USPS) is a unit of government. In fact it may be the most visible and well-known of any unit of federal government. The RPW does not argue this point.

RPW does contend that the sticker is not an “official” document. In its correspondence on this topic, the Election Protection organization asserts that RPW is inserting language into the statute that does not exist. Response to RPW Communication of 9/17/12 at 2. However, G.A.B. staff is of the opinion that the only documents intended to be included in the definition are “official” documents. Indeed it is difficult to imagine what document could be issued by a unit of government that was not “official.” Regardless, the staff opinion does not hinge on the official character of the document.

A sticker also appears to be a document. Absent a statutory definition, G.A.B. staff applies a word’s common definition. A document is “something tangible on which words, symbols, or marks are recorded.” Black’s Law Dictionary 498 (7th ed. 1999). Forwarding address stickers are definitely tangible and contain words.

However, staff concurs with RPW’s conclusion that forwarding address stickers should not be accepted as proof of residence under Wis. Stat. § 6.34(3)(a)11. It appears that the statutory intent is to require the document itself to be issued by a unit of government, not merely that the delivery envelope indicate that it was delivered by the Postal Service. While the forwarding sticker is generated from a database of the USPS, the label is not part of the governmental document which the statutes intended to approve as an acceptable form of proof of residence.

F. Sealed Utility Bills (Newell Affidavit)

A utility bill is included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). However, the Newell Affidavit alleges that a sealed utility bill was presented and the election official did not open the envelope to verify its contents.

Wis. Stat. § 6.34(3)(a)8. states, “A utility bill for the period commencing not earlier than 90 days before the day registration is made.” If a utility bill is not removed from its envelope, even if the recipient’s name and address are visible through a window on the envelope, it is unlikely the election official could verify the period the utility bill covers from an outward inspection. As such, G.A.B. staff concurs that without opening the envelope to inspect the period of the utility bill, the sealed utility envelope itself does not constitute valid proof of residence.

G. Insurance Statement (Boubonnais Affidavit)

An insurance statement is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). While the list of acceptable forms of proof of residence from Wis. Stat. § 6.34(3)(a) does provide some general categories such as “a

document issued by a unit of government,” there is no allegation here that this document contained any information that would suggest it qualified under such a provision. As such, we concur that an insurance statement as described in the Bourbonnais Affidavit would not constitute valid proof of residence.

H. Netflix Envelope (Jones Affidavit)

A Netflix return envelope is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). Netflix is a commercial business and its materials do not qualify as a document issued by a unit of government or as another acceptable form of proof of residence pursuant to Wis. Stat. § 6.34. As such, we concur that a Netflix return envelope as described in the Jones Affidavit would not constitute valid proof of residence.

It should be noted that in her affidavit, Jill Jones states that she did not see a Netflix return envelope accepted as proof of residence. Jones Aff. ¶ 4. Ms. Jones states that an elector was turned away for improper proof of residence and later returned with a different proof of residence. *Id.* Jones indicated in her affidavit that she “heard the poll worker say something about a Netflix envelope,” but it is unclear if that was referencing the first proof of residence that was rejected or the second proof of residence that was accepted. *Id.*

I. Jiffy Lube Receipt (Exhibit 2)

A receipt from Jiffy Lube is not included in the list of acceptable proof of residence documents in Wis. Stat. § 6.34(3)(a). Jiffy Lube is a commercial business and its materials do not qualify as a document issued by a unit of government or as another acceptable form of proof of residence pursuant to Wis. Stat. § 6.34. As such, we concur that a Jiffy Lube receipt as described in Exhibit 2 would not constitute valid proof of residence.

J. Utility Bill Addressed to “Occupant” (Exhibit 2)

Wis. Stat. § 6.34(3)(b)1. states, “. . .the identifying documents prescribed in par. (a) shall contain all the following in order to be considered proof of residence:

1. A current and complete name, including both the given and family name.”

Utility bills addressed to “Occupant” fail this first criterion for proof of residence. As such, G.A.B. staff concurs that even if the document was otherwise valid, if it does not contain the registrant’s current and complete name, it is not acceptable as proof of residence.

K. Cell Phone Bill (Testimony – August G.A.B. Meeting)

Wis. Stat. § 6.34(3)(a)8. states, “A utility bill for the period commencing not earlier than 90 days before the day registration is made.” However, the RPW argues that a cell phone bill is not a utility bill and should not be accepted as valid proof of residence.

Absent a statutory definition, G.A.B. staff applies a word’s common definition. A utility is “a business enterprise that performs essential public service and that is subject to governmental regulation.” Black’s Law Dictionary 1154 (7th ed. 1999). Furthermore, a public utility is “A company that provides necessary services to the public, such as telephones, electricity, and water. Most utilities operate as monopolies but are subject to governmental regulation.” *Id.*

G.A.B. staff has consistently included cell phone service bills as utility bills. This is a longstanding interpretation of the staff for both the Government Accountability Board and the former State Elections Board. In support of the G.A.B. staff interpretation, Wisconsin Election Protection points to a Wisconsin Legislative Council Memo that states: "In general, a person that provides telecommunications services to the public, directly or indirectly, in this state is termed a telecommunications utility... The other two main classes of telecommunications utilities are alternative telecommunications utilities (ATUs) and cellphone service providers." Wisconsin Legislative Council Information Memorandum 2011-07, Regulation of Telecommunications Services, at 1 (2011), *available at*: http://legis.wisconsin.gov/lc/publications/im/im2011_07.pdf.

Contrary to what the RPW suggests in its memo, there is no statutory requirement that the utility bill be for services at the elector's residence. A utility bill for a rental unit address, sent to the landlord's residential address, would be sufficient proof of residence for the landlord as it is a utility bill with the elector's current name and address. Furthermore, that a particular class of electors such as college students may have access to another form of proof of residence is irrelevant in assessing the statutory validity of this type of document.

As such, G.A.B. staff maintains its long-standing policy of including cell phone bills as "utility bills" under Wis. Stat. § 6.34(3)(a)8. and allowing them as valid forms of proof of residence.

II. Public's Right to Observe

The G.A.B. policies with respect to members of the public observing elections are based on state law which permits any member of the public, other than a candidate whose name appears on the ballot, to be present to observe the voting process. Wis. Stat. § 7.41(1). The municipal clerk or chief inspector may restrict the areas within a polling place where observers may be stationed. The designated areas are required to be clearly delineated. The observation areas should be established so that a member of the public may readily observe all public aspects of the voting process. Wis. Stat. § 7.41(2). The G.A.B. is authorized to develop rules governing the proper conduct of observers including the interaction of observers with poll workers and other election officials. Wis. Stat. § 7.41(4).

In 2006, the former State Elections Board developed a series of administrative rules related to election observers after consultation with a number of political organizations, including both major political parties, which recruit and encourage individuals to observe the voting process. The administrative rules were modified and adopted by the G.A.B. pursuant to 2007 Wisconsin Act 1 in December 2009 after a public hearing. The emergency administrative rule promulgated by the Board has expired, but the policy continues in the form of an informational brochure provided to local election officials and members of the public. A copy may be found online at: <http://gab.wi.gov/publications/brochures/observer-rules>. The policy is also articulated in the agency's Election Day Manual for Wisconsin Election Officials developed pursuant to Wis. Stat. § 7.08(3). The information on election observers is on pages 67-69. The manual can be accessed at: <http://gab.wi.gov/clerk/education-training/election-day-manual>.

In response to questions raised by election officials and observers over the course of the last several elections, the Board staff has provided additional guidance to ensure members of the public have the opportunity to exercise the right to observe the public aspects of voting and local election officials are able to do their job of administering the election. The touchstone for our guidance is that the public has a right to observe the public aspects of the voting process and the election officials have the right to do their job without interference or disruption.

Observers are required to:

- Identify themselves to the chief inspector;
- Sign-in on a roster with their name, address and the name of any sponsoring organization;
- Wear tags identifying themselves as observers;
- Stay within the designated observation area;
- Address all questions to the chief inspector;
- Refrain from engaging in activity that disrupts the operation of the voting location.

Election officials are required to:

- Establish designated observation areas that enable members of the public to observe the public aspects of the voting process;
- Ensure that observers can hear the name and address of a voter requesting a ballot;
- Administer challenges permitted by law;
- Conform their conduct to the requirements for administering the election.

A. Reasonable Accommodations for Election Observers

In the 2nd Darrow Affidavit, Nadine Darrow alleged that the Chief Election Inspector at the polling place where she was observing stated that if she wished to observe, she would be required to stand. There is no such requirement in state law or G.A.B. administrative code. While the precise setup of the observer area is not codified beyond its minimum and maximum distance from election officials, seating is a reasonable accommodation that should be provided to all observers where possible to facilitate the public's right to access under Wis. Stat. § 7.41. Clerks and chief inspectors should strive to make reasonable accommodations for persons with disabilities, but there is no affirmative statutory duty to make seating available for all observers.

B. Location of the Observer Area

Observation areas should be between six and twelve feet from the poll workers. This distance was established in consultation with both major parties and a number of political organizations that send individuals to observe the voting process. This distance guideline was never intended as a one-size-fits-all rule. Given the wide range of buildings used as polling places, adjustments to this distance guideline can be made to suit the specific physical characteristics of the voting area. But the litmus test is that in each polling place, members of the public should be able to observe the interaction between the voters and poll workers. If a reasonable observer would be unable to hear the interaction between election officials and voters, the chief inspector should adjust the observation area accordingly to facilitate the public's right to observe the proceedings.

Additionally, while observers are directed to ask questions of the chief inspector, they are entitled to make requests of the other poll workers to ensure that they are able to hear the name and address of a voter requesting a ballot. Similarly, an observer may inform a poll worker that they wish to challenge a voter pursuant to Wis. Stat. § 6.92 *et seq.*

C. Observer Access to Voter Registration Materials on Election Day

Observers are not entitled to view every identifying document offered as proof of residence. A document is not public merely because it is displayed to an election official to satisfy the proof of residence requirement. If a copy of the document is submitted and

retained by the election official, observers may request to view that copy when that request will not result in disruption to the voting process. If the document is not retained, the observer may inquire with the election inspector in charge of registration regarding the type of proof of residence provided when such a request will not disrupt the process of voter registration.

There is also no right to view same day registration documents at the polling place. A voter registration application contains the voter's date of birth, operator's license number and/or the last four digits of the voter's social security number, and any indication of a voter's need for accommodation. Election officials are barred from releasing this information to the public. *See* Wis. Stat. § 6.36(1)(b). It does not logically follow that such information would be publicly available at the polling place, but treated as confidential once entered into the Statewide Voter Registration System. As such, staff has long interpreted this provision to restrict the public's right to view a voter registration application unless the confidential information can be obscured. The G.A.B. encourages election inspectors to make every effort to facilitate the public's right to observe the public aspects of the voting process, but the public right to access has to be balanced with the election officials' responsibility to efficiently and effectively administer the election.

III. Election Officials' Failure to Require Voters to Sign the Voter List

In light of the facts determined at the 21st Senate Recount earlier this summer, RPW asks the G.A.B. to remind municipal clerks of the requirement of Wis. Stat. § 6.79(2)(a) that each elector be required to sign the voter list before receiving a ballot and ask them to monitor voter lists at their polling locations for compliance. A ballot should not be issued if the voter has not signed the poll list. However, as recommended by the G.A.B., the Racine County recount canvassing board did not accept challenges to ballots in cases where the voter did not sign the poll list. Consistent with the language emphasizing elector intent in Wis. Stat. § 5.01, an individual's constitutional right to vote should not be affected due to an election official's error.

G.A.B. staff has made numerous references to the new signature requirement in various training sessions and materials prepared since 2011 Act 23 became law. Special outreach was also made to the election officials in the 21st Senate District following staff review of the recount minutes to correct the deficiencies discovered in practices and procedures.

In addition, in response to issues and incidents reported during recent elections, the G.A.B. determined that Wisconsin would benefit from a renewed emphasis on the fundamentals of election administration. Shortly after the June 5 Recall Election, the Director and General Counsel and the Elections Division Administrator convened a Fall Election Strategic Planning Team which has developed a Back-to-Basics initiative for ensuring a problem-free General Election in November 2012. Full details on the Back-to-Basics initiative can be found at: <http://gab.wi.gov/node/2418>

IV. Wisconsin Guide to Voter Rights and Responsibilities

RPW expresses concern that in the G.A.B.'s new "Voter Rights and Responsibilities" document, that G.A.B. appears to approve of "immediate removal of the election observer from the polling location." As RPW did not quote any particular section of the Voter Rights and Responsibilities document, staff believes the RPW is referring to the section entitled "Repercussions" in the Observer section which states:

- "If you disobey an order of an election official or disturb the polling or canvass place:
- You may be asked to leave if you are causing a disruption"

RPW rightly points out that GAB 4.01(9) indicates a warning shall be issued before ordering removal. However, the language on the Rights and Responsibilities document does not contradict the instruction to warn an offender before ordering removal. In an effort to condense detailed rules and procedures, the informational document advises observers of the most serious consequence for failing to obey lawful orders of the chief inspector. The document is aimed at an audience of voters and observers. Election officials are trained to follow the full procedures outlined in the rule GAB Chapter 4, and the role and regulation of observers has been a point of emphasis in the Board's Back-to-Basics initiative.

V. Electronic Versions of Proof of Residence

In response to the Board's determination on August 28, 2012, that electronic versions of existing proof of residence document types would be acceptable as proof of residence, RPW is asking for clarification. RPW interpreted the G.A.B.'s August 29th news release where Director Kennedy was quoted as saying, "many people today have gone paperless in their lives, including banking, utilities and taxes," to mean that the decision of the Board was limited to those three types of proof of residence.

In the alternative, the RPW asks the Board to reconsider the decision and limit the application of electronic versions of proof of residence to those three categories. RPW asserts that electronic versions of the other proof of residence types would not be reliable. Furthermore, in the interests of security, RPW asks the G.A.B. to instruct election officials that only electronic documents directly from a bank, utility company, or IRS' website should be permissible.

The Board was clear in unanimously passing the following motion at its meeting on August 28, 2012: "Interpret 'identifying document' as used in Wis. Stat. § 6.34 to include electronic documents displayed on electronic devices which may be used for registration purposes. It shall not be the responsibility of municipalities to provide devices or internet access to facilitate this process." This motion was passed unanimously. The motion of the Board had no such limiting language to just bank statements, utility bills, or taxes. The statement by Director Kennedy was merely an example, not intended to limit the Board's decision.

G.A.B. staff released an instructional memorandum regarding the Board's decision to election officials on August 29, 2012. Staff has recently issued more detailed guidance on how to handle the presentation of electronic versions of proof of residence at the polls, and has incorporated it into training for election officials and voter education materials. See attachment which can be found at <http://gab.wi.gov/node/2603>. G.A.B. staff and other local election officials who testified at the August 28, 2012 Board meeting were emphatic that if the Board chose to accept electronic versions of proof of residence, the decision should be made immediately so that sufficient time was allowed for training and voter education on this new policy. G.A.B. staff recommends that the Board not revisit its August 28th decision regarding electronic proof of residence documents.

Because your correspondence and this response touches on a number of issues often raised by voters and local election officials, we will share the essential details of this communication with local clerks and with organizations that provide training to election observers. We trust that this memorandum addresses the concerns and issues you raised. Please feel free to contact the G.A.B. if you have any additional questions.